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No. 04 193

In The

Supreme Court of the United States

MOHAMAD Y. HAMMOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts (other than the fact of a prior conviction) that increase the maximum sentence dictated by the United States Sentencing Guidelines when those facts were not charged in the indictment and neither found by the jury on proof beyond a reasonable doubt (and subject to the admissibility requirements of the Federal Rules of Evidence) nor admitted by the defendant.

2. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts found by a preponderance of the evidence (and without regard for the admissibility requirements of the Federal Rules of Evidence) to apply a section of the United States Sentencing Guidelines, such as Section 3A1.4, that requires proof of elements not found in the underlying criminal statute and increases the sentence above the maximum sentence found in the underlying criminal statute.

3. If the answer to the first or second question is "yes," the following question is presented: What role do the Sentencing Reform Act of 1984 (and specifically 18 U.S.C. § 3552), the United States Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal sentencing practice.

4. If the answer to the first or second question is "yes," the following question is presented: May the Government re-indict Petitioner or convene a sentencing jury to correct the Constitutional violation(s) in light of the Double Jeopardy Clause, the Due Process Clause and *United States v. Jackson*, 390 U.S. 570 (1968).

5. Is Petitioner's sentence under the United States Sentencing Guidelines so disproportional to the maximum sentences found in the underlying criminal statutes that it violates the Due Process Clause.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MOHAMAD Y. HAMMOUD,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohamad Y. Hammoud, through his counsel of record, petitions for a writ of certiorari in a case pending on appeal to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The published order of the United States Court of Appeals for the Fourth Circuit (Case No. 03-4253) affirming the judgment (and sentence) of the United States District Court for the Western District of North Carolina (Docket No. 3:00CR147-1-MU) and holding that "*Blakely v. Washington* ... does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines" was filed on August 2, 2004. App., *infra*, 1. The order can be

found at http://pacer.ca4.uscourts.gov/opinion.pdf/034253OR.P.pdf. The district court's order regarding sentencing was not published, but a transcript of the sentencing hearing has been reproduced in the Appendix. App., *infra*, ___.

JURISDICTION

The district court imposed sentence on February 28, 2003 and entered judgment on March 18, 2003. App., *infra*, 3. Petitioner filed a notice of appeal on March 7, 2003. App., *infra*, 15. After multiple rounds of briefing and oral argument in the Fourth Circuit, including oral argument before the *en banc* court, the Fourth Circuit published an order affirming the judgment of the district court and denying Petitioner relief with respect to sentencing. Petitioner has not sought rehearing before the Fourth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e) pursuant to Sup. Ct. R. 11.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES INVOLVED

The constitutional provisions involved are:

U.S.C.A. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The statutes and United States Sentencing Guidelines involved are set forth in the Appendix. App., *infra*, 52.

STATEMENT

1. The District Court Proceedings

A. The Indictments

On July 31, 2000, Petitioner and sixteen other defendants were named in an indictment. R. 184-212. The indictment charged Petitioner with immigration fraud in violation of 8 U.S.C. § 1325(c) and 18 U.S.C. § 1546 (Counts 1 and 2); conspiracy to smuggle cigarettes in violation of 18 U.S.C. §§ 371 and 2342 (Count 35); and money laundering in violation of 18 U.S.C. §§ 1956(h) (Count 36). *Id.* On March 28, 2001, a superseding indictment charged Petitioner, Said Harb, and others (defined in the indictment as the "Charlotte Hizballah cell") with constituting a RICO enterprise that had engaged in immigration fraud, cigarette smuggling, credit card, mail fraud, wire fraud, money laundering and bribery in order to, among other things, "provide some of the illegal proceeds of the enterprise to Hizballah, a designated foreign terrorist organization" (Count 71). R. 259-76. The superseding indictment also charged Harb, Ali

Amhaz, Mohamad Dbouk, and Hassan Laqis with conspiring to use fraudulent credit cards to purchase military or "dual use" items in Canada for Hizballah, thereby providing material support or resources to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B (Count 72). *Id.* The superseding indictment alleged that Harb, Amhaz, and Dbouk provided additional services to Hizballah, including wiring money to accounts held by Hizballah operatives, obtaining fraudulent identifications for Hizballah procurement activities, and evaluating life insurance for Hizballah operatives killed in the course of terrorist attacks. *Id.*

In February 2002, Harb entered into a sealed plea agreement in which he pleaded guilty to conspiracy to commit immigration fraud, conspiracy to smuggle cigarettes, conspiracy to launder money, RICO, and conspiracy to provide material support to a designated foreign terrorist organization. R. 440. He stipulated to upward adjustments under the United States Sentencing Guidelines ("Guidelines"). All totaled, his offense level was 28, which yielded a Guideline range of 78 to 97 months. *Id.* Ultimately, by testifying against Petitioner, Harb was able to reduce his sentence to less than 4.5 years.[1]

On March 12, 2002, a second superseding indictment added Petitioner and Sheik Abbas Harake, who was described as a Hizballah military commander living outside Beirut, Lebanon, to the list of alleged co-conspirators in Count 72. R. 461-502. Specifically, the second superseding indictment alleged that Petitioner used his position as the leader of a group of Lebanese nationals in Charlotte to support and raise funds for violent Hizballah activity in Southern Lebanon; that he held meetings to solicit funds for Hizballah; and that he sent "unknown thousands of

[1] The stark contrast between Harb's 4.5 year sentence and Petitioner's 155 year sentence is enlightening about how the Guidelines can be manipulated to achieve dramatically different results.

dollars" to Hizballah operatives in Lebanon, including Harake and Shaykh Fadlallah. *Id.* It also alleged that Petitioner provided material support to a designated foreign terrorist organization (Count 78). *Id.*

B. The Trial

The central activity that drove almost all of the alleged offenses was cigarette smuggling. The cigarette smuggling operation, which was conducted by the sixteen defendants (most Lebanese nationals) thrived by purchasing cigarettes at 50 cents per carton tax in North Carolina, then delivering them to Michigan, where they were generally sold at a discount to the $7.50 per carton Michigan tax. R. 464. Profits derived from the smuggling operation sometimes went to a Michigan account in a false name and were then transferred to an account in the same name in North Carolina. Petitioner and his American wife/co-conspirator Angela Tsioumas, had joint authority over those accounts.

Tsioumas, who testified against her husband pursuant to a plea agreement, testified that she was not a member of a "Charlotte Hizballah cell;" had never been a member of Hizballah; and had never given any money to Hizballah. R. 2015-17. Like Tsioumas, none of the other members of the alleged "Charlotte Hizballah cell" testified that they were members of Hizballah or that the purpose of the cigarette smuggling was to support Hizballah. Indeed, no fact witness testified that the purpose of the cigarette smuggling was to obtain money for Hizballah.

Harb, the Government's star witness, testified that he was not a member of Hizballah. R. 2806. He testified that Petitioner had told him that the charitable donations made by Petitioner and others were sent to Harake, an alleged military commander for Hizballah in Beirut. R. 2760. Harb "corroborated" this claim by testifying that he had once carried $3,500 intended for Harake to Beirut at Petitioner's

request. R. 2763-64. However, Harb testified that he never delivered the money to Harake even though he spoke with him by telephone while he was in Lebanon. R. 2764-66. Instead, Harb gave the envelope to his *mother* for delivery to Petitioner's mother without ever mentioning Harake. R. 2765. Neither Harb nor any other witness provided evidence that the money reached Harake, yet this was the sole financial transaction supporting Counts 72 and 78 against Petitioner. With respect to procuring dual-use technology in Canada, Harb testified that Petitioner was not involved. R. 2685-86, 2734-49, 2860.

Petitioner testified in his defense. He testified to being born in the Bourj Al-Barajneh, a poor neighborhood of Beirut that has suffered from militia occupation by the Palestinians, who left when the Israelis invaded, followed by Amal, then Hizballah. R. 3040-43. Petitioner openly acknowledged his sympathies with Hizballah's humanitarian efforts in Lebanon and its effort to expel the Israeli army from Lebanon. R. 3077-78. He indicated that he was in the United States because his brother had told him how good it is here. R. 3050-51.

Although Petitioner admitted that he had received many requests for money for the Lebanese Resistance from Abu Adham, he testified that he had never sent Adham any money. R. 3070. Petitioner also admitted that Harake, who had been his next door neighbor in Lebanon since he was a child, is a member of Hizballah. R. 3076. However, Petitioner denied ever sending money to Harake. R. 3076-77. He further denied ever giving Harb money to send to Harake, his mother or anyone else.

Petitioner testified that Fadlallah is a worldwide spiritual leader for Shi'a Muslims, not a member of Hizballah, and has been in conflict with Hizballah over the last several years. R. 3071-72. Petitioner admitted sending him money in 1994, when Fadlallah was not on any terrorist

list, but sent none after it became illegal to do so. R. 3074. The Government presented no evidence to the contrary.

C. The Jury Verdict

After a three-week trial, the jury began its deliberation. Count 71 (RICO) charged the enterprise with four purposes, only one of which involved Hizballah. In response to a question from the jury, the district court instructed the jury that it had to agree unanimously on one or more of the four purposes, but it was not required to agree unanimously on all four purposes or any particular one. R. 3626-29.

On the third day of deliberations, the jury asked "[D]o we have to find one conspiracy or a conspiracy out of multiple (sic) utilizing only some of the manner and means of conspiracy." R. 3648. The district court instructed the jury that in order to convict on Count 72 (conspiracy to provide material support), it must find that "that there was a single conspiracy, not multiple conspiracies. Multiple conspiracies with a common goal. Not what was charged." R. 3648. This instruction conflated the separate conspiracies into one. At approximately 3 p.m. that afternoon, the jury indicated that it could not reach an agreement on Count 72; the District Court responded with an *Allen* Charge. R. 3641-44. The jury emerged with the verdict form at 5:20 p.m. that day. R. 3650. The verdict form asked the jury to vote guilty or not guilty on each offense and contained no special interrogatories. The jury found Petitioner guilty on Counts 1 and 2 (immigration fraud), 35 (conspiracy as to cigarette smuggling), 36 (conspiracy as to money laundering), 37 and 41 (cigarette smuggling), 43 and 49 (money laundering), 53, 54, and 55 (credit card fraud and conspiracy as to same), 71 (RICO), 72 (conspiracy to provide material support), and 78 (material support). *Id.*

D. The Sentencing

On February 28, 2003, Petitioner was sentenced to 1,860 months imprisonment in accordance with the recommendations of a Presentence Investigation Report ("PSR") first prepared on October 31, 2002. App., *infra*, 49. As an initial matter, the PSR grouped all of the offenses for Guideline calculation purposes and used the most serious offense to establish the base offense level. R. 836. According to the PSR, the most serious offense was the violation of 18 U.S.C. § 2342 (conspiracy to smuggle cigarettes) because under U.S.S.G. §§ 2E4.1 and 2T4.1, the base offense level was determined by reference to the amount of tax evaded. *Id.* With respect to this issue, the PSR concluded that the "conspiracy involved more than $2,500,000 in taxes evaded." Pursuant to U.S.S.G. § 2T4.1(J), it found that the base offense level was 24.[2] *Id.*

To the base offense level of 24, the PSR added another (1) two points under U.S.S.G. § 2S1.1(b)(2)(B), because Petitioner was convicted of violating 18 U.S.C. § 1956, (2) two points under U.S.S.G. § 2S1.1(b)(3) for "sophisticated [money] laundering," (3) four points under U.S.S.G. § 3B1.1 for being a "leader and organizer," and (4) two points under U.S.S.G. § 3C1.1 for "obstruction of justice." R. 837-38. The PSR then increased the resulting offense level of 34 by another 12 points pursuant to the terrorism enhancement in U.S.S.G. § 3A1.4. R. 3691-92, 3706. U.S.S.G. § 3A1.4 also increased Petitioner's criminal history category from a I to a VI, despite the fact that Petitioner had no prior offenses. *Id.* The end result was a base offense level of 46 and a criminal history category VI, which yielded a Guideline range of "life." R. 3706.

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[2] Elsewhere, the PSR referred to a tax loss of "over $3 million dollars" and "in excess of $4 million dollars." R. 833-34. The PSR did not reconcile these internal inconsistencies.

The maximum sentences authorized by the statutes setting forth the various offenses for which Petitioner was convicted ranged from 60 to 240 months. Rather than limit the sentence to the statutory maximum of the most significant offense, the district court imposed the maximum sentence for all but two offenses[3] and then "stacked" them to reach the "life" sentence mandated by the Guidelines. App., *infra*, 52. Thus, the district court imposed consecutive 240 month sentences on Counts 36, 43, 49 and 71, consecutive 120 month sentences on Counts 2, 54, 55, 72 and 78, and consecutive 60 month sentences on Counts 1, 35, 37, 41, 53. *Id.* at 49. The district court handed down the 1,860 month (155 years) sentence because it believed that it was "required by law." *Id.* at 49.

2. The Court of Appeals Proceedings

After an initial round of briefing, a three-judge panel of the Fourth Circuit heard oral argument on May 4, 2004. On June 30, 2004, the Fourth Circuit ordered supplemental briefing and a rehearing *en banc* on the impact of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), on the sentencing issues raised by Petitioner. Oral argument before the *en banc* court was held on August 2, 2004. That same day, the Fourth Circuit published an order affirming the judgment of the District Court and holding that *Blakely* "does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines." App., *infra*, 1. The order directed district courts within the Circuit to continue sentencing defendants pursuant to the Guidelines, but pending a definitive ruling by the Supreme Court, also announce an alternative sentence pursuant to 18 U.S.C. § 3553(a) treating the Guidelines as "advisory only." *Id.*

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[3] The district court imposed 120 month, rather than 180 month, sentences on Count 72 and 78.

REASONS TO GRANT THE PETITION

In *Blakely*, this Court reaffirmed that the Sixth Amendment's right to a jury trial includes the right to have a jury determine that the Government has proved beyond a reasonable doubt all facts legally essential to the sentence imposed. *Blakely*, 124 S. Ct. at 2533 . By most accounts, this reaffirmation created serious ripples in the previously still waters of the federal sentencing scheme. See, e.g., *United States v. Penaranda*, 2004 WL 1551369 (2nd Cir. July 12, 2004) ("*Blakely* not only casts a pall of uncertainty on more than 22,000 federal sentences imposed since Apprendi was decided ..., but it also raises the prospect that many thousands of future sentences may be invalidated. . . ."); *United States v. Gonzalez*, 2004 WL 1444872 (S.D.N.Y. June 28, 2004) ("Needless to say, Blakely calls into question the long-standing practices of federal courts in implementing the United States Sentencing Guidelines"). Petitioner is aware that this Court granted certiorari this week in *United States v. Booker*, 2004 WL 1535858 (7th Cir. July 9, 2004), *cert. granted*, 2004 WL 1713654 (August 2, 2004) and *United States v. Fanfan*, 2004 WL 1723114 (D.Me. June 28, 2004), *cert. granted*, 2004 WL 1713655 (August 2, 2004) both of which present questions related to *Blakely*'s impact on the Guidelines. Petitioner argues that this case is an appropriate, indeed necessary, companion to *Booker* and *Fanfan* because of the breadth and uniqueness of the issues this case presents.

1. This Case Allows The Court To Address A Wide Range of *Blakely* Issues

The core *Blakely* issue in both *Booker* and *Fanfan* is the district court's determination regarding drug quantity. See *Booker*, No. 04-104, Petition for a Writ of Certiorari, p. 2-7; *Fanfan*, No. 04-105, Petition for a Writ of Certiorari, p. 7. By contrast, this case presents six different *Blakely* issues. Based upon proof by a preponderance of the evidence (and

without regard for the admissibility requirements of the Federal Rules of Evidence), the district court found (1) that Hizballah was a 'terrorist organization and that Petitioner had committed a federal crime of terrorism with the specific intent to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct; (2) that Petitioner had evaded taxes in excess $2.5 million; (3) that Petitioner had obstructed justice; (4) that Petitioner had engaged in sophisticated money laundering; and (5) that Petitioner had occupied a leadership or organizing role in the underlying conspiracy. The district court then "stacked" multiple maximum statutory sentences to reach the "life" sentence dictated by the Guidelines. Each aspect of this judicial debacle allows the Court a distinct opportunity to provide lower courts with guidance about the real-world impact of *Blakely*.

2. This Case Allows The Court To Address *Blakely*'s Impact On Un-Charged Crimes

In *Fanfan*, No. 04-105, the district court's reliance on facts not charged in the indictment and not proved to the jury beyond a reasonable doubt would have increased Fanfan's sentence by a factor of 3 (from a Guideline range of 63 to 78 months to a Guideline range of 188 to 235 months). See *Fanfan*, No. 04-105, Petition for a Writ of Certiorari, p. 3-4. In this case, the district court's reliance on facts not charged in the indictment and not proved to the jury beyond a reasonable doubt increased Petitioner's sentence by a factor of more than 30 (from Guideline range of 46 to 57 months to a Guideline range of "life," which the district court imposed in the form of a 1,860 month sentence). This jaw-dropping increase in Petitioner's sentence is primarily the result of the district court's application of U.S.S.G. § 3A1.4, which in and of itself increased Petitioner's base offense level by 12 and shifted his criminal history category from a I to a VI.

To apply Section 3A1.4, the district court had to find (1) that Hizballah was a terrorist organization and (2) that Petitioner committed a "federal crime of terrorism," which requires specific intent to "influence or affect the conduct of government by intimidation or coercion" even though neither fact was charged in the indictment nor presented to the jury. This fact-finding resulted in Petitioner being sentenced for an entirely different crime (violation of U.S.S.G. § 3A1.4) with an entirely different *mens rea* than the one for which he was convicted by the jury (violation of 18 U.S.C. § 2339B).

The only mental state requirement in 18 U.S.C. § 2339B is that the defendant must "knowingly" provide material support or resources to a foreign terrorist organization. 18 U.S.C. 2339B. The district court instructed the jury that a defendant acts knowingly when "he was conscious and aware of his action, realized what was happening around him, and did not act because of ignorance, mistake or accident." R. 3315. The district court's instructions did not even require the jury to find that Petitioner had knowledge that his conduct was unlawful.[4] The district court, however, went beyond the jury verdict to find that Petitioner specifically intended to affect the conduct of government by intimidation or coercion or to retaliate against government conduct based upon literature found in Petitioner's home (R. 2248-2301), selected videotape excerpts of Hizballah (*id.*), and unsupported allegations about attacks by Hizballah on Americans and Western Europeans (R. 3091-3100). The district court did not even bother to enumerate which clause in U.S.S.G. § 3A1.4 ("intended to affect" or "retaliate against") it was basing its finding on or which "government" it believed that

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[4] Contrast *United States v. Kent*, 912 F.2d 277, 280-81 (9th Cir. 1990), *op. withdrawn and superseded on reh'g by*, 945 F.2d 1441 (9th Cir. 1991) (reading "knowingly" as requiring knowledge of unlawfulness of conduct where statute criminalizes broad range of apparently innocent conduct); *Liparota v. United States*, 471 U.S. 419, 426 (1984) (same).

Petitioner intended to affect or retaliate against. Concern for this type of judicial fact-finding was at the core of the Court's holding in *Blakely*:

> "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."

Blakely at 2539 (emphasis in original). This case provides the perfect vehicle for the Court to address the impact of *Blakely* on un-charged crimes.

3. This Case Allows The Court To Address *Blakely*'s Impact On Base Offense Level Calculations And Enhancements

To determine Petitioner's base offense level, the district court blindly adopted the PSR's conclusion that the conspiracy caused a tax loss of greater than $2.5 million. R. 837. This conclusion was apparently based on documents in the United States Attorney's discovery file, interviews with un-named agents, and untested estimates. *Id.* At trial, the district court had defined "contraband cigarettes" for the jury as "a quantity in excess of 60,000 cigarettes which bear no evidence of the payment of applicable state cigarette taxes ...." R. 3315. Thus, even if each of the three convictions related to 18 U.S.C. § 2342 (Counts 35, 37, 41) involved different contraband cigarettes, the only fact fully supported by the jury's verdict is that Petitioner sold 180,003 cigarettes, which is equivalent to 900 cartons of cigarettes. At $7.50 tax per carton,[5] the only fact fully supported by the jury's verdict is that Petitioner avoided $6,750 in taxes. Under U.S.S.G. § 2T4.1, a tax loss of $6,750

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[5] $7.50 tax per carton is the assumption used in the PSR. R. 833.

yields a base offense level of 10. With a criminal category history I, a base offense level of 10 translates into a Guideline range of 6 to 12 months. Nevertheless, the district court, rather than the jury, found that Petitioner avoided more than $2.5 million in taxes and thereby raised his base offense level under U.S.S.G. § 2T4.1 from a 10 to a 24. Had the jury been asked to find a specific amount of tax loss, they would have had to consider the considerable evidence that the Government failed to take into account legitimate sales of cigarettes for which tax was paid. For example, when the sentencing of Petitioner's brother and alleged co-conspirator Chawki Hammoud, the district court accepted evidence introduced at trial that a significant amount of tax (at least $1 million) was paid and therefore a significant credit was due. R. 2175.

The district court increased Petitioner's sentence for "obstruction of justice" under U.S.S.G. § 3C1.1 based upon the spurious allegations in the PSR that Petitioner attempted to destroy evidence, harm the prosecutor, and committed perjury when he testified at trial. The Government admitted that the jailhouse snitch who claimed Petitioner conspired to harm the prosecutor was unreliable, and had likely falsified evidence; nonetheless, the district court found this sufficient to provide support for an enhancement by a preponderance of the evidence.

The district court also increased Petitioner's sentence for "sophisticated [money] laundering" under U.S.S.G. § 2S1.1(b)(3) and for having an "leadership/organizing" role in the conspiracy under U.S.S.G. § 3B1.1. If the jury had been asked to determine the latter issue, it may well have concluded that Petitioner did not have a leadership role as the conspiracy was in place long before Petitioner became involved.

4. This Case Allows The Court To Address *Blakely*'s Impact On "Stacking"

Both *Booker* and *Fanfan* involve convictions on a simple drug charge. In contrast, this case involves multiple convictions and "stacking" - the imposition of consecutive sentences for multiple offenses to reach the sentencing range dictated by the Guidelines. The maximum sentence allowed by statute for any one of the offenses for which Petitioner was convicted was 240 months (20 years). However, Petitioner's sentence was 1,860 months (155 years) because the district court imposed the maximum statutory sentence for all but two of the offenses and then made them run consecutively so as to bring the sentence within the "life" range under the Guidelines. This draconian approach to sentencing merits special consideration in light of *Blakely*. Where, as here, the sentence dictated by the Guidelines exceeds the maximum sentence that is authorized by statute for the most serious offense, the effect of the Guidelines is to impose a sentence that exceeds the statutory maximum for the offense that drives the sentence. In this case, U.S.S.G. § 3A1.4, intended to punish crimes of terrorism, called for a sentence of "life" even though the most serious terrorism offense for which Petitioner was convicted (18 U.S.C. § 2339B) carries a maximum penalty of fifteen years unless the death of any person results from the terrorism. 18 U.S.C. § 2339B(a)(1). In this case, no such death was alleged or proved at trial or at sentencing. Nonetheless, Petitioner's 18 U.S.C. § 2339B conviction resulted in a "life" sentence.

5. This Case Avoids The Peculiarities Of 21 U.S.C. § 841

Booker and *Fanfan* have little bearing on other federal criminal cases because the sentencing scheme at issue in those cases involves the escalating statutory maximums and statutory minimums contained in the federal drug statute, 21 U.S.C. § 841. Like the criminal statutes at issue in this

case, most federal criminal statutes simply state a statutory maximum and leave the sentencing calculation up to the Guidelines. Consequently, this case allows this Court to address *Blakely's* impact on the most common form of federal criminal statutes. Because this case is not a drug case, it also avoids the circuit conflict on the question of whether drug quantity is statutorily defined as an element of the Section 841 offense. See generally Brief *Amici Curiae* of National Association of Criminal Defense Lawyers and National Association of Federal Defenders at 17-18, *Booker*, No. 04-104, *Fanfan*, No. 04-105, *United States v. Bijou*, No. 04-2572,

6. This Case Allows The Court To Address The Appropriate Remedy For *Blakely* Violations

Circuit courts and district courts have proposed a number of different remedies for *Blakely* violations. See *United States v. Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) (noting that the district court may convene a "sentencing jury" on remand); *United States v. Zompa*, 2004 WL 1663821 (D. Me. July 26, 2004) (applying Guidelines sans enhancements based on facts not admitted by defendant); *United States v. King*, 2004 U.S. Dist. LEXIS 13496 (M.D. Fl. July 19, 2004) (sentencing defendant within range established by statute but using Guidelines for guidance); *United States v. Landgarten*, 2004 WL 1576516 (E.D.N.Y. July 15, 2004) (scheduling a "sentencing jury trial" to decide enhancement factors beyond a reasonable doubt); *United States v. Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004) (sentencing defendant within range established by statute); see also *United States v. Thompson*, 2004 U.S. Dist. LEXIS 13213 (S.D. W.Va. July 14, 2004) (unpublished) (postponing all sentencing hearings until after October 15, 2004 "in the interests of justice."). Although all of these remedies have flaws, sentencing juries may implicate additional Constitutional concerns. *Zompa*, 2004 WL 1663821 (D. Me. July 26, 2004) ("In this case, the drug

quantity enhancement was not included in the Information to which the Defendant pled guilty, nor did the Defendant admit to distributing any particular amount of cocaine base. Multiple constitutional principles, including Due Process and Double Jeopardy, may ... prevent[] the Government from now seeking to prove beyond a reasonable doubt that this Defendant can be held accountable for distributing 15.3 grams of cocaine base."). But see, *Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) ("Unless the facts sought to be proven by the government to enhance Ameline's sentence constitute elements of a statutory offense required to be alleged in the original indictment, the constitutional prohibition of double jeopardy would not be implicated."). This Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), also may pose an obstacle to convening sentencing juries. Jackson, 390 U.S. at 580 (in the context of rejecting the concept of a sentencing jury, noting "[i]t is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."). Unlike *Booker* and *Fanfan*, this case specifically raises the issue of remedy and therefore is the perfect vehicle for this Court to provide much needed guidance to the lower courts.

7. Petitioner's Sentence Presents An Additional Fifth Amendment Issue

All nine Justices in *Blakely* recognized that an enhancement may so disproportionately increase a sentence that the disputed sentencing factor become "a tail which wags the dog of the substantive offense," in violation of constitutional Due Process. 124 S. Ct. at 2560 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); *Blakely*, at *8 n.13 (majority opinion); *id.*, at *28 (Breyer J., dissenting). Here Petitioner received a "life" sentence under the Guidelines for "terrorism" but the maximum penalty under the statute that is the basis for the conviction (18 U.S.C. §

2339B) is 15 years, the validity of the Guidelines under the Fifth Amendment is legitimately before this Court. Thus, this case presents the Court with the issue of whether a sentence imposed under the Guidelines is so disproportionate to the sentence for the underlying statutory offense that a defendant's Due Process rights under the Fifth Amendment are violated.

8. The Exceptional Circumstances Of This Case Warrant Granting Certiorari Before Judgment

Admittedly, the grant of a petition for writ of certiorari before judgment in a case pending in a court of appeals is rare. See *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976). This Court grants certiorari in such cases "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

In the first instance, the strict standard of Sup. Ct. R. 11 should not apply to Petitioner because for all intents and purposes, the Fourth Circuit has entered judgment in this case. After two rounds of briefing and two rounds of oral argument - one before a three-judge panel and one before the *en banc* court - the Fourth Circuit published and filed an order affirming the judgment entered by the district court and expressly holding that "*Blakely v. Washington* ... does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines." App., *infra*, 1. Moreover, the Fourth Circuit used the order to direct district courts within the Circuit to continue sentencing defendants pursuant to the Guidelines. *Id.* Granting certiorari in this procedural posture represents only a minor deviation from normal appellate practice.

Even if the strict standard of Sup. Ct. R. 11 applies, this case satisfies that standard. This case presents exceptionally

important legal questions related to the constitutionality of the federal sentencing scheme. The Court recognized the importance of some of these questions by granting certiorari this week in *Booker* and *Fanfan* -- even though the latter had not proceeded to judgment in the courts of appeals. The similarity between some of the questions presented by this case and the questions presented by *Booker* and *Fanfan* does not preclude a grant of certiorari before judgment because, as outlined above, this case is different from *Booker* and *Fanfan* in constitutionally significant ways. This Court granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244 (2003) because it involved an affirmative action policy with important differences from the program at issue in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and therefore allowed the Court an opportunity to address the constitutionality of race in university admissions in a wider range of circumstances. Similarly, this Court should grant certiorari in this case to address *Blakely*'s impact in a wider range of circumstances.

CONCLUSION

This case is an ideal companion to *Booker* and *Fanfan*. It presents a wide range of *Blakely* issues in a non-drug context and has the additional advantage of presenting a disproportionality issue under the Fifth Amendment. For the foregoing reasons, Petitioner requests that this Petition for a Writ of Certiorari be granted and that this case be ordered briefed and heard by the Court on the same schedule as *Booker* and *Fanfan*.

This 6th day of August, 2004.

Respectfully submitted,

/s/James P. McLoughlin, Jr.
Of Counsel

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4253

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MOHAMAD YOUSSEF HAMMOUD,
a/k/a Ali Albousaleh,
a/k/a Ali Abousaleh,

Defendant - Appellant,

CENTER FOR CONSTITUTIONAL RIGHTS; NATIONAL COALITION TO PROTECT POLITICAL FREEDOM; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NATIONAL LAWYERS GUILD,

Amici Supporting Appellant.

ORDER

[Entered: August 2, 2004]

After oral argument was heard by a panel of judges, a majority of the judges in active service voted to hear this appeal en banc. The en banc court heard argument on the matter on August 2, 2004.

According to the vote of a majority of the en banc court constituted to hear this appeal, we affirm the judgment and hold that Blakely v. Washington, 124 S. Ct. 2531 (2004) does not operate to invalidate Hammoud's sentence under the federal Sentencing Guidelines. Therefore, district courts within the Fourth Circuit are hereby instructed to continue sentencing defendants in accordance with the guidelines, as was the practice before Blakely. In the interest of judicial economy, however, and pending a definitive ruling by the Supreme Court, we recommend that district courts within the Fourth Circuit also announce, at the time of sentencing, a sentence pursuant to 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2004), treating the guidelines as advisory only.

Majority and dissenting opinions will follow in due course.

Entered at the direction of Chief Judge Wilkins, with the concurrence of the court.

For the Court,

/s/ Patricia S. Conner
Clerk

United States District Court
For The Western District of North Carolina

UNITED STATES OF AMERICA

V.

MOHAMMAD YOUSSEF HAMMOUD
aka Ali A.A. Abousaleh
aka Ali A.A. Albousaleh

Stanley Cohen
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 3:00cr147-1Mu
[Entered: March 18, 2003]

THE DEFENDANT:

___ Pleaded guilty to count(s).

___

P

leaded nolo contendere to count(s) which was accepted by the court.

_X_ was found guilty on count(s) 1ss, 2ss, 35ss, 36ss, 37ss, 41ss, 43ss, 49ss, 53sss, 54sss, 55sss, 71sss, 72sss & 78sss, after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
8:1325(c)	Marriage to Evade a Provision of the	9/12/97	1ss

	Immigration Laws		
18:1546(a)	False Statements to Immigration and Naturalization Services	7/5/00	2ss
18:2342 & 18:371	Conspiracy to Ship, Transport, Receive, Possess, Sell, Distribute and Purchase Contraband Cigarettes	7/00	35ss
18:1956(h)	Conspiracy to Commit Money Laundering	7/21/00	36ss
18:2342 & 18:2	Ship, Transport, Receive, Possess, Sell, Distribute and Purchase Contraband Cigarettes and Evade State Taxes, and Aiding and Abetting the Same	2/2/97	37ss
18:2342 & 18:2	Ship, Transport, Receive, Possess, Sell, Distribute and Purchase Contraband Cigarettes and Evade State Taxes, and Aiding and Abetting the Same	10/10/97	41ss
18:1956(a)(1) & 18:2	Money Laundering, and Aiding and Abetting the Same	8/28/97	43ss
18:1956(a)(1)	Money Laundering,	6/3/97	49ss

& 18:2	and Aiding and Abetting the Same		
18:1029(b)(2)	Conspiracy to Unlawfully Use Counterfeit Devices and Use of Unauthorized Access Devices	5/8/98	53sss
18:1029(a)(1) & 18:2	Unlawful Use of Counterfeit Access Device, and Aiding and Abetting the Same	5/8/98	54sss
18:1029(a)(1) & 18:2	Use of Unauthorized Access Devices, and Aiding and Abetting the Same	5/8/98	55sss
18:1962(d)	Racketeering	7/21/00	71sss
18:2339B	Conspiracy to Provide Material Support or Resources to a Designated Terrorist Organization	7/20/00	72sss
18:2339B	Providing or Attempting to Provide Material Support or Resources to a Designated Foreign Terrorist Organization	9/24/99	78sss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984

___ The defendant has been found not guilty on count(s).

_X_ Count(s) 1, 1s, 2, 2s, 35, 35s, 36, 36s, 37s, 41s, 43s, 49s, 50s-52s, 50ss-52ss, 53s, 54s, 55s, 61sss, 61s-67s, 71s (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 237-75-3540
Defendant's Date of Birth: 9/25/73
Defendant's USM No.: 16449-058

Defendant's Mailing Address:
5425 Donnefield Drive
Charlotte, NC 28227

Date of Imposition of Sentence: 2/28/03

_____
Signature of Judicial Officer

Graham C. Mullen
Chief Judge, United States District Court

Date: _____

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Counts 36ss, 43ss, 49ss & 71sss: TWO HUNDRED FORTY (240) MONTHS each count to run consecutively with each other; Counts 2ss, 54sss, 55sss, 72sss & 78sss: ONE HUNDRED TWENTY (120) MONTHS each count to run consecutively to each other and with all other counts; Counts 1ss, 35ss, 37ss, 41ss & 53sss: SIXTY (60) MONTHS each count to run consecutively with each other and with all other counts, for a total of ONE THOUSAND EIGHT HUNDRED SIXTY (1860) MONTHS.

_X_ The Court makes the following recommendations to the Bureau of Prisons:

That the defendant participate in the Inmate Financial Responsibility Program to pay his assessment.

Forfeiture is ordered in accordance with the first preliminary order filed 2/11/03.

_X_ The defendant is remanded to the custody of United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

___ At _____ On ___.
___ As notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ Before 2 pm on
__ As notified by the United States Marshal.
__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Counts 1ss, 2ss, 35ss, 36ss, 37ss, 41ss, 43ss, 49ss, 53sss, 54sss, 71sss, 72sss & 78sss: THREE (3) YEARS each count to run concurrently with each other.

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state or local crime.

2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.

5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she

is released within 72 hours of release from custody of the Bureau of Prisons.

9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10. The defendant shall support his or her dependents and meet other family responsibilities.

11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.

12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.

15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant, and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searched pursuant to this condition.

18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to

make such notification and to confirm the defendant's compliance with such notification requirement.

22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$1,400.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

_X_ The interest requirement is waived.

___ The interest requirement is modified as follows.

COURT APPOINTED COUNSEL FEES

___ The defendant shall pay court appointed counsel fees.

___ The defendant shall pay $_____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A _X_ payable immediately; or

B ___ $ immediately, balance due (in accordance with C or D); or

C ___ No later than; or

D _X_ through the Inmate Financial Responsibility Program. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court costs.

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be sue during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA

-against

MOHAMAD YOUSSEF HAMMOUD
Defendant

NOTICE OF APPEAL
Docket No. 3:00-cr-147
[Entered: March 10, 2003]

Notice is hereby given that Mohamad Hammoud, defendant in the above named case hereby appeals to the United States Court of Appeals for the Fourth Circuit from the judgment of conviction and the final order entered after sentencing thereon in this action on the 28th day of February, 2003.

/s/ Mohamad Hammoud
Mohamad Hammoud

/s/ Stanley L. Cohen
Stanley L. Cohen, Esq.
119 Avenue D
New York, New York 10009
(212) 979-7572

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs.

MOHAMAD YOUSSEF HAMMOUD
Defendant.

3:00CR147
FEBRUARY 28, 2003

[Entered: February 28, 2003]

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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MOHAMAD Y. HAMMOUD

STANLEY L. COHEN, ESQ.
119 Avenue D
Third Floor
New York, New York 10009

Proceedings reported and transcript produced by:

JOY KELLY, RPR
U. S. Official Court Reporter
(704) 375-7505

(Court called to order at 10:00 a.m. and defendant present in courtroom.)

THE COURT: All right. Good morning, counselor. Are we ready to proceed?

MR. COHEN: Good morning, Your Honor. Yes, we are, for the defense.

THE COURT: All right. This matter is before the Court for sentencing. Mr. Mohamad Youssef Hammoud, having been found guilty after a trial by jury, the jury verdict sheet entered on the 21st day of June of 2002.

There are -- there's no reason to worry about factual bases, et cetera, since this is the result of a jury trial. There are numerous objections from the defense. Do you wish to be heard on those, Mr. Cohen?

MR. COHEN: Your Honor, thank you. Just very briefly, and I think it's in the light of I had a discussion with the government last night about whether -- what, if anything, they intended to introduce before the Court today

with regard to evidence with regard to response to our arguments, and the government indicated it did not. And, quite frankly, we do not plan on introducing any evidence or seeking any new findings of fact by the Court.

I would just like to speak briefly about the submissions which we provided with regard to our objections, and we'll stand on all fours with those submissions, except I'd like to expand or clarify --

THE COURT: Is it relatively fair for me to conclude that the bulk of your objections seem to center around Apprendi issues?

MR. COHEN: Apprendi plus, with the material support issue that I would suggest that there's that second prong which was not satisfied. Essentially it's Apprendi plus that issue, yes, Judge.

THE COURT: All right, sir. Then if you would, you may proceed.

MR. COHEN: Thank you, Judge.

We're not going to retry the case obviously. I read the transcript, have taken a look at the voluminous discovery, had a chance to speak with the defendant on more than enough occasions to reach concern conclusions.

I'm not going do reargue Apprendi. I think it's throughout our papers. I think, Judge, this is not a case where the stacking concept applies at all. I think in brief that Apprendi stands for the proposition that where a sentence is driven by the amount in a particular case, that that's where it applies whether it's a drug case, whether it's a white collar fraud case, whether it's a tax case, and I think that applies here.

I think that, in essence, while the government has certainly proved beyond a reasonable doubt what was required by the statute, the minimum, and while the instructions speak to that, the upward, the additional sentence, the additional time was not satisfied, but that's Apprendi and Your Honor will make a ruling as a matter of law.

The Probation Department goes on to talk about how the defendant -- and correctly so, and I think we made a typographical error in our submission -- is entitled to the built of the 2002 Guidelines. But yet we would respectfully suggest they give with one hand and take with two because they don't then give him the benefit of 2002 Guidelines.

THE COURT: Where?

MR. COHEN: I'm sorry, Judge?

THE COURT: I say where is that?

MR. COHEN: Well, I think that under the Guideline Section 2M5.3, with a base level of six with no enhancement, is what really applies to this particular case, even though I'll give with one and take with two, because I suggest even in that light it's outside the heartland of that particular subdivision.

At the end of day probation applies 3A1.4, and with it the 12-point increase and the escalator from a Career Criminal History I, all the way up to VI, which is a life sentence. Everyone agrees to that.

And I would suggest that taking a look at the legislative intent, taking a look at the 2002 Guidelines, and I would urge the Court to consider obviously the 2002 Guidelines post 9/11 can certainly not be described as being enacted to

given the benefit or to improve the rights or to expand benefits for an accused. If anything, all the legislation which has come down in the area of alleged terrorism has made it more restrictive and more difficult, has chosen to penalize defendants or arguably fall within the rubric of such misconduct even more harshly than before.

But yet 2M5.3 as compared to 3A1.4 is very different in that under 2M5.3, if he does fall within the heartland, it's a base level 26, a Career Criminal History of I, I believe would score out at 155 to 188 months, which is a significant sentence for anyone, let alone for the conduct which was established or which the jury accepted in this particular case.

With regard, going back to the Probation Department's suggestion that 3A1.4 applies, the second prong, it seems to me, and I've looked at and looked at it then looked at it, and I may have missed it and we've looked at the history, very clearly talks about that in addition to the conviction, there has to be proof that there was specific intent to, quote, "influence, intimidate or coerce government" -- I'm leaving out the rest of the sentences --in order to trigger the elevator, the escalator clause. That is to say to take it from what would perhaps be a 15-year sentence or an 18-year sentence, to escalate it all the way up to a 43, and from a one to six and mandate life.

I would suggest that without that second prong, even if you apply the section which the probation report speaks of, we still end up in the area of 155 to 188 months.

I'm not going to speak about the obstruction issue, Judge. The Court -- I was not witness to this trial. Your Honor sat through this trial. You'll make whatever decisions with regard to --

THE COURT: Well, I have a problem conceptually with that whole process of a defendant who takes the stand and then gets hit with a two-point -- I think your cases are correct, that I have to find specific elements of perjury after a fact-finding hearing, and ultimately, I don't think it makes any difference in the sentence. So I'm going to allow your objection on the two-point enhancement unless you have stuff that I can pinpoint and go down -- I don't think it makes any difference in the sentence.

MR. BELL: Well, as long as everything holds up at the circuit it wouldn't. If there was something that the Court finds walking through the objections to the PSR that the circuit disagreed with, it could come to matter.

You're right, if everything holds up and it's an offense level 46 reduced to 43, it won't make any difference.

THE COURT: The cleanest trial I've ever done in the whole time I've been doing this.

MR. BELL: I agree with you and hope we're both right. And I do have some specific suggestions of things that were clearly perjurious --

THE COURT: Let's go back, then, and we'll argue that specifically, and let's let Mr. Cohen finish up what he has to say on the legal issue.

MR. COHEN: Judge, with regard to the nature of the sophisticated operation, again I'm going to rest on our arguments in the papers.

I think that it's no more sophisticated, no less sophisticated than any substantive offense which he was convicted of as part and parcel of it. But Your Honor will make a decision as a matter of law on that and hope springs

eternal. And we'll see where we end up on that particular issue.

With regard to the leadership role, I'm going to again rest on the arguments. I'm not going to belabor that particular point.

I would like to close out very briefly, Judge, and then obviously my client wishes to address the Court, with my view of my client as a young man. My view of the case.

I have been trying cases for 20 years all over the United States and done work in other venues, and sometimes you become so insinuated into your own self-fulfilling prophecy, sometimes you become so locked into what you believe it says or it doesn't say, it tends to admittedly distort the picture.

The advantage I have in this particular case is other than reading about this cryptically in the news from clippings in New York over the last year or year and a half, I didn't know anything about the case.

So I sat down and we had a chance, along with Mr. Brown assisting me in the Fourth Circuit, to read the transcript several times, to look at the discovery, to talk to the defendant at length, to talk to his family, to travel to Beirut, Lebanon, where I was approximately, I don't know, a month or six weeks ago to meet with his family, to meet with other persons that might have or may yet be involved in terms of helpful in the investigation of this matter.

I also bring to the table the fact that obviously this Court has before it one defendant and one case. But I have represented many, many cases involving Muslim activists where there have been some insinuations of terrorism or connected terrorism throughout the United States. So I have

had an opportunity to spend the better part of a decade researching, writing and litigating issues of Hizballah, Hamas and organizations both within the United States and without the United States. And I say that only because coming in after the fact has allowed me to take a sort of a -- I think -- well, objective is also self-serving -- but a different look. Not as the trial attorney who tried the case, although reasonable minds can disagree as trial attorneys as to how it should have been tried or should not, and I think I disagree with some of the strategy. But that's not what this is about right now. But in terms of who the young man is, who Mohamad Hammoud is and what the case is about.

As I said, I visited Lebanon. I sat with his infirmed elder mother -- older mother, elderly mother -- a bunch of family members in a small hotel in downtown Beirut, who spent the better part of three or four hours, I think, on three different sessions talking essentially about Mr. Hammoud, his upbringing, his youth, whether he was political, whether he's not political, whether he showed any signs of political interest or involvement while he was a young man in Beirut, whether they have seen any indication of that in the years since he's come to the United States.

I learned -- now, he grew up in a very difficult time, in a difficult place that was all at once torn, not just between a horrible civil war where hundreds of thousands of persons lost their lives and the entire country was torn asunder, but which was essentially occupied for more than 20 years.

THE COURT: It still is.

MR. COHEN: It still is. And I bring that up -- maybe by different occupation forces. But it's just been a process of occupied, occupied, occupation, which informed and infirmed the upbringing, the youth of the defendant in a

way that I think to some degree leads us to where we are today.

I have found absolutely nothing in my investigation, and obviously the government has accessed the information and intelligence status, some which may have played out in the court and some which did not, that leads me to conclude on all fours that Mr. Hammoud is an individual that is not in any way, shape or form connected to Hizballah. Is he someone who grew up in a time and a place where his sensitivities, his feelings, his commitment to millions of still impoverished people in Lebanon was infirmed? Absolutely. Did he grow up with other persons in a time where they later went on to occupy positions in an organization called Hizballah, which some people call terrorists and other people call The Army of Lebanon. I'm not here to try to convince Your Honor one way or another.

I've looked and looked and I've said to myself, okay -- and cigarettes are cigarettes, Judge. He's a cigarette smuggler and not good at that. Not accomplished at that. I don't deny that. The evidence shows that. The guidelines are appropriate, although I disagree with the level based on tax loss and the amount.

What the case really comes down to, I respectfully suggest to Your Honor, is whether this young man is going to spend life in jail or maybe 15 or 18 years, or somewhere around there, based upon this alleged connection, this incident -- this one, it seems to me, incident in connection with the money transaction. That's what it comes down to, Judge. Everything else is -- for two years, three years, five years, seven years we're dealing with someone of his age and his background -- that's, as we say, the whole show.

And I would respectfully suggest that this is not a case where this young man should get a life sentence. I don't

believe the Guidelines that score out and permit the 155 to 188 months are necessarily appropriate, although if Your Honor disagrees I'd gladly take it. I'd argue differently on appeal to the Fourth Circuit. At the low end it's more than enough.

What we have here, and as I look at the legislative history and I think about proportionality, the country lived through some horrible event in September 11th and there's horrible events continuing on. Congress has spoken. Congress has looked at the issue of terrorism and alleged terrorism and it seems to me under 2002 the amendments sort of didn't replace what was on the books before but certainly took a broad sweep and a broad brush and established a process of proportionality which says if a individual is convicted of certain crimes as opposed to certain other crimes, this sentence is appropriate as opposed to another sentence.

I would suggest that in the case where -- while the government -- apparently, and again I haven't had a lot of discussions with the government, I admit it, the case --while the government has alleged that there was a large amount of money, and I don't know exactly how much money and I don't know how much -- the jury didn't decide how much money was made or sold or benefitted, was raised over an extended period of time. And the government would suggest to the Court that it somehow found its way into the coffers of Hizballah. There's no proof to support that, Judge. Zero. None.

What we have, I suggest respectfully, is a singular insular transaction, I believe, involving some $3,500, in which I find it interesting the evidence seems to support that the person who received it was -- we can debate whether he was a propaganda person with Hizballah, whether he was with the political wing, whether he was -- I

don't suggest the military wing -- that could be debated as well. But he then gives essentially a receipt thanking the defendant more or less for the money that's going to be used for the people.

I think that's what it comes down to. And the government can say all day long there's millions of dollars involved here and there's a long paper trail. Lord knows, the government has the ability to establish a paper trail. They've proven it since September 11 in a lot of cases and they didn't prove it here.

And in that light, Judge, I would suggest there's two aims or two arms here. The Sentencing Guidelines were, I think, a mistake to begin with. I was certainly willing to defer, and I did for may years, to the wisdom and experience of the Court to take a look at a case, to take a look at the facts and to impose an appropriate sentence.

THE COURT: I couldn't agree with you more. I think probably even the prosecutor would share that, but nevertheless we have what we've got.

MR. COHEN: We have what we have. However, there are -- notwithstanding the Guidelines, and thank God, Congress at the end of the day said, but, of course, the Court has the ultimate say, power and discretion, although Your Honor knows better than I, you've got to lay the foundation so that the Fourth Circuit or the Second Circuit or the Ninth Circuit doesn't send sit back six times.

But ultimately the Guidelines were enacted to essentially introduce the concept of uniformity, of proportionality. And in theory they were introduced to balance the individual's background and the crimes and circumstances along with similarly situated individuals.

Now, I realize this case is sui generis in terms of -- since 9/11. In fact, it's pretty much sui generis in terms of most other cases that involve alleged cigarette smuggling or tax fraud, so there's not a lot to compare it to in terms of the whole proportionality analysis. But there is a lot else that's out there that it can be compared to.

There have been cases both before September 11th and since September 11th in which you have individuals who have been charged with overt acts that completely overshadow anything attributed to this young man, that have been charged with acts of violence that completely overshadow possession of weapons and conspiracies, use of force, and a whole process that is so far at the other end of the scale as compared to this young man, that in the spirit of the Guidelines, and in the spirit of proportionality, and in the spirit of mercy, Your Honor -- I'll speak about that a bit and I'm not going to preach to the Court. When it comes to that issue, Your Honor's reputation as a just jurist is well known.

I really don't think this is a case which calls for life. I don't think it's a case which in the spirit of the Guidelines calls for life. I think a life sentence would be out of the heartland of this particular statute, whether it's the old application or the new application.

I'd be the first -- I'd love to stand before you, Judge, and say, Judge, it's about cigarette smuggling and nothing else. I think an argument could be made. The jury rejected that. They did accept that, cigarette smuggling plus. And again I'm focused on that "plus" issue.

And I think there's a wealth of discretion for this Court to compute the Guidelines, to use your inherent authority, to take a look at this young man, to compare it to what others have done or not done in coming with a sentence

below what the Probation Department says the Court should or can or, in fact, they suggest must -- I don't except the "must" because the Court always has the inherent authority to carve out based upon facts circumstances and the law an appropriate sentence.

I would respectfully suggest to the Court, keeping in mind our objections to the obstruction and to the supervisory role and to the sophisticated nature of the operation, and keeping in mind the fact that we don't believe the boost in terms of the extra points for the tax loss was met by the burden -- was met by the government, rather, in the Apprendi issue, keeping in mind all of that, I suggest to the Court at worst blush we should be dealing with a Guideline range of 155 to 180 months.

THE COURT: All right, sir. I want to make sure you have on the record -- because my understanding of the habeas areas is that, indeed, you may make a proportionality argument where there is a life sentence without parole. I want to make sure that I understand that you are, in fact, asserting that as a constitutional issue of significance at this point in this proceeding.

MR. COHEN: I am, Your Honor.

THE COURT: All right, sir.

All right, Mr. Bell. And we will give Mr. Hammoud an opportunity to address the Court.

MR. COHEN: Thank you, Judge.

THE COURT: I would like to hear from you with reference to these arguments.

MR. BELL: Your Honor, then I'll address the 3A1.4 and perjury issues.

THE COURT: I think that would be appropriate.

MR. BELL: Apprendi has been disposed of, I think, pretty well by the Probation Office, as have the other objections.

3A1.4, Your Honor, we filed a sentencing memorandum earlier in the week and that guideline is applicable if two things are proven: That is, has this felony come in connection with a federal crime of terrorism, which is defined by being --

THE COURT: Let me just interrupt you right here. Now, you were referring to 2M what?

MR. BELL: 3 -- 5.3 Your Honor.

MR. COHEN: Yes, Judge. 2M5.3.

MR. BELL: That's a new guideline specifically for 2339B, which did not exist prior to this latest edition.

The reason that's not the guideline that ought to be applied in this case is simply that the base offense level under that guideline is 26. Oddly enough, the base offense level under the money laundering guidelines for this is a 28, as it worked out, so that's the most serious charge. So that the calculations done by the Probation Department continue to be the correct ones to apply to Mr. Hammoud.

So even though the PSR didn't reference that section, it wouldn't have made -- it doesn't make any difference in the sentence.

THE COURT: Okay. I'm sorry I got you off-track. If you want to start over with the 3A1.4.

MR. BELL: 3A1.4 provides that if this felony -- the felony conviction is in connection with a federal crime of terrorism, then the Guideline applies.

There are two things to be established in determining whether it's a federal crime of terrorism.

First, that it be one of several statutes that was violated, 2339B being one of them. So the only prong that is worthy of discussion is whether the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

And, Your Honor, the distinction I draw factually as to why that guideline should apply to Mr. Hammoud but not every defendant convicted of 2339B is that it would be a violation of 2339B for an individual to give money to Hizballah not knowing what Hizballah does; that is, kill people and blow things up, among others things. So you could be guilty of 23393 and not have that guideline applicable to you.

THE COURT: Even if you made a donation strictly for charitable purposes.

MR. BELL: And that was my second example.

If somebody knows -- they give money to Hizballah, but they really are thinking and intending to give that money to the widows and orphans; that is, this is what I thought Hizballah did. They know who Hizballah are, they know they are an organization, but that's not their motivation. It's

sort of a motivational element. You're giving material support and resources to Hizballah. Why?

So in this sentencing memorandum we filed we recounted for the Court some of the evidence of Mr. Hammoud's specific knowledge of the violent conduct of Hizballah with respect to the governments of United States and Israel. That his direct connection to Hizballah is Mr. Harake, who there's testimony is the military commander for the Beirut suburbs, as opposed to the orphanage director. And I have -- if the Court wants to hear more, I have another dozen examples of videotapes and FISA intercepts where it's the military aspect, the violent aspect, the retaliatory aspect of Hizballah that was of concern to Mr. Hammoud.

So when he's giving money, as the jury found, to Hizballah, and specifically with reference to Count Seventy-Eight, the money to Harake, who is the military guy, that's what distinguishes him and the applicability of this guideline from others who could be convicted of the statute without the same motivations. And for those reasons the guideline does apply to Mr. Hammoud.

Now, with respect to the perjury counts, I do have -- I hear what Your Honor is saying. If the Court sustains the PSR, it's an offense level 46, these two levels don't matter. And I hope you and I are right that the circuit isn't going to take issue with any of this. But I do have some specific suggestions as to where Mr. Hammoud's testimony was clearly perjurious and calculated to deceive the jury.

Perhaps the easiest one is on page 1807 of the transcript where on --

Ms. Rubio wants me to add to my last argument, Your Honor, one of the things that we put into evidence was the

interview of General Secretary Nazarallah of Hizballah, where he says, "The money comes in and gets comingle and I decide where it goes," which is a point worth making and I didn't.

On page 1807 of the transcript, on cross examination Mr. Hammoud was asked specifically about the $3,500 that Said Harb testified was taken by him from Mr. Hammoud and destined for Harake. And Mr. Hammoud's answer was, "Well, not only this 35, I swear I never, never, never in my life, since '92, I gave Said either penny to my parents, not to Sheikh Abbas, ever to my parents, I never gave a dollar to my parents since '92 until this time. I never sent Said. He's the only person I never sent to Lebanon."

Well, the jury clearly found different. So that's the easiest, most straightforward example of his perjury. I have about a dozen more in here if the Court wants me to go on.

The case that Mr. Cohen cited is the guide for the Court, it's United States vs. Jones, 2002 case, where the Court needs to find that the defendant gave false testimony concerning a material matter with the willful intent to deceive rather than a mistake. That's the easiest, most straight forward. I have another dozen if Your Honor wants to entertain those suggestions as well.

THE COURT: Well, I think here's the time to make the record.

MR. BELL: All right. On page -- beginning on page 1870, Mr. Hammoud testified contrary to the testimony of F.B.I. Special Agent Khoury, who in telling the jury about Mr. Hammoud's post-arrest debriefing, quoted him as saying he regularly sent eight or nine hundred dollars by couriers to Lebanon. Mr. Hammoud's testimony is that

Mr. Khoury was wrong about that; that that only happened one time.

At page 1872, Mr. Hammoud testified in response to the question, "Did you send the money then to the charitable part of Hizballah?"

"Answer: No, I never sent anything has to do – I don't like to send basically to association or anything. I like to send it directly."

In that point he denied ever sending any money to even the charitable wing of Hizballah, which is obviously contrary to the jury's verdict in Counts 72 and 78.

On page 1877 Mr. Hammoud testified that he never sent money to The Resistance no matter what Abu Adam put in his letters to that effect.

On page 1887 Mr. Hammoud testified that Harake is in the propaganda wing, not the military. That's contrary to the testimony of Matthew Levitt, the Court-certified expert witness and Said Harb.

One thing I did – I should have mentioned this also during the 3A1.4 argument, again to show Mr. Hommoud's political motivations, essentially, which is necessary for that.

On page 1884, when he's being asked about some statements by General Secretary Nasserallah, his anti-American statements, in this testimony Mr. Hammoud says, "But those are just things people say hoping that the U. S. will change its foreign policy." So again emphasizing he knows what Hizballah is doing is gearing its acts towards affecting, retaliating, intimidating U. S. Government actions.

That should do it, Your Honor.

THE COURT: All right.

MR. COHEN: Judge, may I just very briefly respond to two points raised by the government?

THE COURT: You may.

MR. COHEN: Judge, first of all, the government, it seems to me, is arguing two separate issues. One as to the second components of the material supports section and the other has to do with perjury.

The first is that somehow the government is arguing that knowledge can -- without more, or knowledge even with some more, which is visibly absent here, somehow end up to specific intent.

The second element that is required under the section of 3A1.4 is not a statute that talks about knowledge, so that even if the government is correct that the defendant has certain knowledge about certain things that persons involved with Hizballah allegedly do, that does not establish that it was his intent by making a donation to carry out that particular component or intent or that aim as opposed to -- and the record is very clear, even the government's own expert and witnesses talked about how Hizballah is a multifaceted organization. It has an army component which is essentially the Army of Lebanon. It has a charitable component, it has a school component.

THE COURT: It's the Army of Shi'a Lebanon. Is that not correct?

MR. COHEN: Well, Judge, there's a government army which is essentially about a thousand soldiers that are in Beirut and then the army -- literally the army --

THE COURT: I've knocked you off track. Go back to what you were talking about.

MR. COHEN: Oh. So knowledge does not mean specific intent. They have to prove beyond a reasonable doubt -- they had to prove beyond a reasonable doubt for the second component of that elevator, escalator clause to work that that was his intent, something which they didn't do, something which wasn't asked in a special verdict sheet of the jury, something which wasn't argued to the jury. It needs something which wasn't included in the instructions. So we're now here after a trial, after a jury has made findings of fact, certainly as to one of the two components, but it's not disjunctive, it's "and", now arguing, well, the jury must have meant the second component as well because look at what the record shows.

The jury never said that. They never decided that question. It was never proven beyond a reasonable doubt. Never raised. Afterwards the government is now saying, well, of course that's what it meant. He knew this, Judge, so what it means, because of his knowledge this was his intent. That's something that never went to the jury. And that really is on all fours, an Apprendi issue in that context and it's an element.

Now, with regard to the perjury, Judge, they started out -- the fact that someone is found guilty after they have testified does not mean without more that they have committed perjury. And that's why as Your Honor pointed out in acknowledging the cases I cited, there has to be specific examples where someone -- where the elements of testimony or statements have been proven to be perjury. Being contrary doesn't establish, doesn't amount to perjury.

If we took for the premise the government raised several times a few moments ago that the jury rejected this, the jury

rejected this, the jury rejected this and found him guilty and thus he was lying, it does two things.

Number one, we don't know what the jury decided or why. We didn't Monday morning visit and say this is what they meant and why. They may have accepted certain things he did and rejected other things. They may have believed he was mistaken as a matter of memory, not as a matter of bad intent.

To embrace, as the government does or suggests with broad sweep, that a guilty verdict necessarily means perjury would, number one, fly in the face of the law, but more importantly it would deter clients, defendants from ever testifying. Because the defendant knows if I testify and I get convicted, I'm getting perjury.

THE COURT: Well, I don't want to go -- I don't want to say too much. The cases are rather difficult for me to reconcile. Nevertheless, I think I am prepared to go forward at this time.

MR. COHEN: Thank you.

THE COURT: First, I need to deal with your departure motion. And this shows the difficulty of out-of--town counsel.

However accomplished and articulate as you are, sir, there is a standing order in this Court that any suggestions for a downward departure have to be briefed and supply the Court with an analysis on the matter in the case of United States versus Joyce Higdon. That is not present here, and, therefore, the Court will in its discretion not depart. Now, let me deal with the other matters.

I will adopt the response of the Probation Office to the objections. And as to your suggestion that the Jones case must apply, it clearly does.

There is clear testimony from Mr. Hammoud that he never sent any money to Lebanon at all. And there's a clear receipt for money. So there is a clear -- there is a clear false statement and I would find that it is made with the intent to deceive.

The other matters that have been related by Mr. Bell are perhaps subject to your analysis and argument that mere disagreement doesn't constitute a false statement. However, the jury found otherwise and I think that I'm stuck with that. But at least as to that one where there's a clear-cut -- I think it's there and I find it was done with intent to deceive. I therefore find that this man is a level 46, Criminal History Category VI.

The sentencing protocol, if you will, is somewhat peculiar in this regard as calculated by the Probation Office. And at this time I think Mr. Hammoud may address the Court on his own behalf if he wishes to do so.

THE DEFENDANT: Thank you, Your Honor.

It's hard for someone to say something when the fate of his life is going to be decided in a few minutes.

I have been thinking about a lot what I was going to say, but it's hard for me to say what I want to say, especially I have a lot of things that are hurting me and I want to address in front of Your Justiceness. Perhaps one thing that could make it easy for me to say and talk and give me some courage, your well knowing justiceness. I hope you can be patient with me.

I want to the start with the most things that been bothering me.

Since June 21st, 2002, every day I wake up and I think about this issue, and I ask myself question: How was I convicted in the Canadian conspiracy? At least with the other charges I know somebody came and stand and said something, and then the jury believed them and they convicted me upon. But with the Canadian conspiracy, I still to now, I can't find any, ~~any~~ answer for it.

I went and I looked in the trial transcript thinking I might could find answer or something that I missed during the trial. I found one thing.

Mr. Bell said that Said is a middleman between Charlotte and Canada. So I went to look and see what Said has to say. When my lawyer asked Said if I know Mohamad Dbouk, he said I don't know him. And he said I don't know anyone in Canada.

Also when my brother's lawyer asked him, he said Said, is it part of conspiracy or you helped Dbouk because he's your best of friend? Said replied and said he helped him because he was his best of friend.

I still think why I was -- I mean those -- there was no evidence that I was -- I had anything to do with Canada. Beside, the record showed that I never been in Canada. I never called Canada. And in addition to all of that, during the Canada conspiracy, the most activity that was taking place at that time, I was in Lebanon, and when I came back I wasn't talking to Said.

Now Mr. Bell said, well, now Mohamad is saying that his relations severed with Said because Said is cooperating. I am sure Mr. Bell did not pay attention to Mr. Khoury's

testimony or to my statement. Otherwise he would have seen that. I said in my statement to Mr. Khoury in July 21, 2000, that I don't talk to Said since I came from Lebanon because of his involvement in the pornography and other dirty works. And Mr. Khoury testified to that as well.

So I still think what make the jury think and convict me in Canada -- Canadian conspiracy?

Perhaps because Mr. Bell asked me at least ten questions about Hizballah activity back in the '80s when I was between 10 and 14 years. Or maybe because he asked me what "Death to America" means at least ten times and then he repeated it again in his closing statement and that made the jury think what they thought.

And besides all of this, I was reading in "Newsweek" article, and they said most of those allegations, they were done by Hizbadallah (ph), and which is one of American ally in the era against Saddam. Also I told him, and -- in '80s when Hizballah was doing this, no one liked him. No one liked Hizballah. And I was one of those people who hated Hizballah. And I hated to find when he was leading Hizballah.

If we liked Hizballah, we like to think Hizballah, very humanitarian help and other things is -- The Resistance against the occupation, which is with accordance to the United Nations and the international law, and to the April 1996 Accord, which is the United States was one of its broker, and I'm sure the United States won't be broker for something illegal or terrorist.

As you now know, Hizballah -- and everybody knows now -- Hizballah is more toward politics. Since maybe nine years or so they became part of the parliament and they have all the legal issue people elect them.

And just last month, with the front, phoney meeting that contained at least 55 presidents and prime minister from all around the world, Nasserallah was present in this meeting and he was just one of those people. Chirac, the French president was there. The Canadian prime minister was there. Denmark's prime minister was there. There were a lot of country leaders.

Or maybe I was convicted because the expert said that Harake is a military commander and Said Harb said that as well. But I want to ask a question: If somebody came here and testified and he said he's an expert in Catholic religion and he said that the Pope John II's church here in Charlotte, would anyone believe him and would anyone think he's an expert? Well, saying that Mosque Zembinali (ph) in Bourj al-Barajneh is Fadlallah's mosque is just like saying John Paul II's church here in Charlotte.

I believe the expert completely relied on is statement on Said. And Said, himself, said that he doesn't know Harake by face. Who knows Harake by face? Samir Debk. He said I know Harake by face and he lives close to my parents' house. But what he said about them, he said I don't know what his position. All of I seen him solving problems and I don't think solving problems is considered a military commander.

Beside Mr. Bell said he has the videotape that on it Sheik Harake. Well, I don't remember this tape but I can assure you that if Harake on this tape, he's hosting for the celebration.

Your Honor, Sheikh Harake is not military commander. He's in the propaganda wing. And if you see that tape that -- if he's on the tape, you play it, you'll see him. He's hosting celebration. That's his job and that's what always I knew about him.

Or maybe I was convicted because they played a little portion of the tape that has anti-American slang. That I never paid attention to it.

When I called my brother I asked him, bring me this tape. I hear about the operation in the news. I tell him does it have a tape? Send it to me. He send it. I don't look carefully for what this tape contained or what --all I know, I look at the label of the tape. That's The Resistance of Operation blah, blah, blah and that's all.

Well, when the tapes was playing I saw it in the jury's face, everybody -- they were -- they were smiling and looking at me just as a human being. When they saw those tapes, completely they changed. They start looking at me like they hated me. They don't want me anymore. And I don't blame them. They love their country. And somebody here who is foreigner, committing crimes and now he hates them and wants to kill them. I'm sure anyone would be standing there going to feel obligated to not only send this guy to life, send him to hell.

And, of course, when I explained to them what it meant, at least to me, or what it means when in Lebanon people said it, they don't believe me. Especially now after September 11th. This words means a lot. Not like maybe back before September 11th. If I had said that, maybe that, they believe it. But now they said they saw people who done it.

And people in general, they do not distinguish between Muslim bin Laden and Muslim real Muslim. They don't -- those people do not know that bin Laden hates us more than he hates anyone. They don't know bin Laden people killed thousands of Shi'as in Afghanistan. They don't know that bin Laden people killed hundreds in Uzbekistan all over.

Just one month ago, one even in Lebanon, he stayed in the middle of Beirut and he opened fire and he killed people. He said, "I am belong to bin Laden and I think Shi'ite is disbeliever and Christian are infidels." I have the article here. And they killed people and they left. That's bin Laden people. And I think now they think almost I'm just like bin Laden.

Or maybe because Said claimed that I had an envelope, even though he described my envelope that on it "for resistance," even though he described my Greenbriar apartment and then had said, no, the envelope was not labeled.

But, Your Honor, I had a jar. It was on my computer desk. I asked my lawyer about it a hundred times. Where this jar? If this jar was present, then everybody can know that Said is lying and Medhat is lying.

The jar, you know what has on it? It has "for poor, needed and orphan." It has also a saying, "Help who is in the land, the one who is in the heaven would help you." I have it on my computer desk. It was -- it was yellow strapped (ph) . I asked about it a hundred times. I never got it.

Then also I had a notebook. It written on it, "Don't open. Don't touch. Mohamad. Special." In this notebook I have all my financial issues that is special between me and my God. Every penny that I sent to donation for komas (ph), for everything, I have in that notebook. If I lend anyone money, I have it in this notebook. If I borrowed money from someone, I had this in my notebook.

And I had my well (ph) on it, inside this notebook. I found my well. And my well, they said they found it in this notebook. I asked my lawyer about it many times. I told

him this notebook, if I got it, I can convince them that I did not send what they are saying. Well, he said they don't have it. But how come they got my well and they were not able to find my notebook?

Besides, if I had this notebook, when I told the jury that I did not pay in 1996 and 1997 komas (ph) and Mr. Bell has the right to say, he said, well, he had money at that time. He was working in cigarettes. Yeah, I was working in cigarettes but I did not make money. And if I had this notebook I would prove that I did not pay money in '96 or '97. I was broke at this time. I was taking from my credit card. I was working cigarettes but I was getting help a lot.

Or maybe I was convicted because my lawyer did not prepare any of my witnesses and he did not call my main witness, Abu Adam, father-in-law, who was willing to come and testify and say what Abu Adam was. And he was as a teacher, English teacher, in Lebanon. And who can say that Abu Adam have never been in Lebanon before, in his life before he left in '95 or '96. And he can tell the jury what he thinks in thanking me for. He's the one who gave me the medications. He was the one who that give me the class. He always the one who I call him whenever somebody is leaving to Lebanon. I tell him you want to send something to Abu Adam? He tells me yeah. I come and I get all the stuff and they send it to Abu Adam. So he was able to clear a lot of things up. I did not get him. I don't know why.

Or maybe because I was not able to retain language specialist who can come and testify and tell the people that the word "jinhakna" is only one word and it has only one meaning. It means "our people." It does not mean "our guys." It does not mean "our group." It means "one." And at the same time, he can come and say -- explain how we are in Arabic, in general we speak in plural. I mean we speak a lot in plural. We don't speak in singular that much.

Especially respecting each other, all the time we speak as "we", while I am.

Or maybe because my lawyer refused to bring an expert who can testify who is Hizballah, and to tell the people someone who is like -- tell the jury someone who is like myself who talks in public about Hizballah and who has videotapes about Hizballah cannot be a Hizballah because Hizballah, everybody read about Hizballah. Hizballah very secret organization. Someone like me cannot be a Hizballah because if somebody thought about Hizballah, they can come and pick me up. I'm the first one, in the restaurant, always I speaking about Hizballah politics.

And also he can tell the jury that if you take money for poor it cannot go but to the poor. And if you take to the orphan and it cannot go but to the orphan. And if you are not the follower, if Humani (ph) and Kameniahe (ph), the school, your money cannot go to Nasserallah because Nasserallah is the representatives of Kamaniahe and Kemet (ph) school. He's not the representative of other schools.

Or is it because we were happy when Israel withdraw from our country after their illegal occupation for 22 years. Or we cannot be happy when something bad happened to the army that invaded our land, destroyed our house with their airplanes. Kills thousands of our innocent children and all the people, and they deprived us from all means of life.

Or we should not congratulate each other when two airplane, military airplane, destroyed or crashed while they coming to Lebanon to kidnap and kill people in violation of international law and all human law.

Or if it is a crime to watch videotapes for some military operations that had been done in Lebanon, in our land, and

in the defense for our land, and those operations, according to April Accord, it's a legal operation. United States was a broker on it too.

I am very certain if we had asked those questions to all the American who were under the Britain occupation they would have good answers. And if you had asked it to the French who were under the Nazi occupation, they would have good answer. If we had asked it to anyone who knows what it's like to be under the occupation and how you feel, they would give a good answer. And I am sure, Your Honor, I heard you were in the Navy and you went to protect your country, I'm sure you have also good answer for this.

Your Honor, the occupation left us with a lot of pain and lot of bad memory. But that does not mean we are violent people. We are not violent people. We like peace. And we appreciate peace maybe more than anyone because we always were without peace, we never had peace. So we love it and we appreciate it. But we don't try to do violence.

I had here one guy, he's the son of the agent who arrested me and tortured me. He's the one who when my mother was came -- came to visit me, he pushed me away and yelled in front of my mother at me while I was arrested. I saw him here in Charlotte. And he was agent as well. I never said a word for him that hurt his feeling. Even I never told him his father what his son had done to me. I know him. I think he does not know me but I know he was agent. And I never hurt his feeling, Your Honor.

Now, I want to talk about another thing that hurt me more all those charges. After all of this I get to be accused of killing and destroying the ambulance and escaping from jail. Your Honor, I want to ask a question.

THE COURT: Well, let me tell you that I have already disposed of that issue in your favor.

THE DEFENDANT: Okay. Well, now, Your Honor, after I revealed some of my pain, I want to say I'm sorry for not paying tax. I am sorry for not saying the truth in some forms. I try to cooperate with the government. It did not work out. So I can face some of what I did wrong.

I am sorry for not saying the truth to the INS because I wanted to stay here. I wanted to live in freedom and peace. I wanted to be just like all those people. I want my -- I don't want to go back to the poverty. Just like millions of people who come from all around the world, some of them die in the desert, some of them drown in the ocean just to come here so they can live in peace and freedom.

I just was one of those people who has a lot of a dream. I want my children. I was dreaming that my children one day would raise here and they would be able to buy what they need, they able to go to school and improve my parents' life and everything.

Your Honor, since I have been here in the United States, since I left I was 18 years old. I was away from my family. I was away from everyone. Everyone who loved me. I sacrificed a lot for my goal. Perhaps I went a little bit in the wrong way or I went in the wrong way to achieve my goals. And I admit to that. And I'm sorry for it. I'm sorry for you and I'm sorry for everybody to do that.

Since I been here I sacrifice. I missed - my oldest sister died. I did not go to say goodbye to her just because I want to stay here in this country. I do not want to lose my future. I don't want to destroy my future. And, of course, now I regret that.

After all my dreams that I dreamed, in July 21st, 2000, all those dreams destroyed when I lost everything. Now my only hope that -- my only hope that I still have on my mind and I pray for is that I can go back to Lebanon and see my mother before she die, since that's what she always pray. She always pray for me that she wants to die while we're all next to her. I don't know if her wish is ever going to be true.

Now, Your Honor, I ask you, please, if you believe in God, treat me accordingly. And you are the one --whenever I mentioned your name, everybody knows you by your justiceness. I have mentioned your name between Raleigh to Florida to Washington. Everybody tell me that I'm very fortunate to have you on my case.

I ask you, since you are very well known in your justiceness, just treat me like you treat most people. Don't treat me differently.

I thank you very much for your patience.

THE COURT: All right. Mr. Bell, do you have anything that you wish to say?

MR. BELL: Very briefly, Your Honor.

You know, the protestations of peace and innocence and naivety about Hizballah really ring empty when you think about the virtual library of Hizballah, anti-American, anti-Israel, vitriolic, violent condemnations.

Whether you recall the video about pledging to detonate themselves and shake the ground under our feet or the many incantations of "Death to America," that does not square with this poor man who was just wanting -- his explanation is, "I only wanted to see the part where we're at war with the Israelis in the south. I'm a man of peace. And

that stuff about death to American and explosive belts against Americans, I just don't believe in any of that."

If you -- even just a short look through Mr. Hammoud's life -- and, you know, I keep thinking about that videotape with his nephews being prompted and they're responding with "Hizballah. Hizballah." Beautiful little children, a couple years old, already being taught to raise their fist in the air and chant "Hizballah". Or the picture of Mohamad Hammoud himself in 1989 with the AK-47 raised, the picture of Ayatollah Khomeini behind him with the caption, "Mohamad Hammoud at the Hizballah Center." Or the pictures of him sitting around with his pictures of the Ayatollah Khomeini and General Secretary Nasserallah.

Or these pictures, Your Honor, which we didn't put into evidence at trial but I've marked them for Government's Exhibit Sl, 2 and 3 for sentencing purposes.

(Shows documents to defense counsel)

And I move them in, Your Honor, and offer them to the Court.

S3, with Mohamad Hammoud -- these were taken from his home, Your Honor, standing here in the Charlotte area with a rifle in his hands.

One and two with him playing tourist in Washington, D.C. in front of the Washington Monument, and with his codefendant, Mohamad Atef Darwiche in front of the White House.

Your Honor, these protestations of innocence, persecution, desire for peace do not square with the evidence, they do not square with the jury's verdict, and

they do not square with the library of violent material we took out of his house.

The sentence that the Court will impose as a result of its findings of the applicability of the guidelines is right and just.

THE COURT: Well, having determined that and adopting the findings of the Probation Office, the sentence falls out as a matter of law.

Madam Clerk, we found 46 and six. You'll have to -- I don't know how you put that on the J&C but it winds up a 43 and six because it exceeds the maximum level under the guidelines.

And because of the quirks of sentencing as explained in the Presentence Report, the Court has the following proposed sentence: On Counts 36, 43, 49 and 71, 240 months on each count consecutive. On Counts 2, 54, 55, 72 and 78 -- Madam Clerk here's your list -- 120 months each count consecutive to each other and all other counts. On Counts 1, 35, 37, 41 and 53, 60 months each count consecutive to each other and all others counts, for a total of 1,860 months incarceration. Three years supervised release. Each count standard conditions. Special assessment $1,400 due and payable through the Inmate Financial Responsibility Program. The Court finds that this man has no ability to pay a fine. There is no fine.

It is not the kind of sentence that I think anybody takes any kind of pleasure in, Mr. Cohen, and I do so because I believe it is required by law.

MR. BELL: Your Honor, if I might, just one question. Mr. Bradford asked me to ask the Court to state during its imposition of the judgment that the forfeiture is ordered in

accordance with the first preliminary order filed on February 11th of '03.

THE COURT: So ordered. If you'll make the language known to the clerk.

Mr. Hammoud, you have the right to appeal your conviction and you have the right to appeal the sentence of the Court.

If you are indigent, you may file a Certificate of Indigency in order that the Fourth Circuit will appoint someone for you. If you do appeal, you must do so in writing. Your appeal will have to be signed. You'll have to sign the Notice of Appeal. There is a limited period of time after the preparation of the judgment and commitment within which you must file your notice of appeal.

Mr. Cohen, are there any other issues that you wish to make sure are on the record?

MR. COHEN: Judge, only -- and it really is -- it's completely academic, I would object to the -- and the Court -- they are in -- I would object to the three photos which were introduced as part of the proceeding, but it's obviously -- it's an academic issue. Just so that it's on the record. In all other respects it's fine. I will be perfecting the appeal and filing the appropriate notice with the Court.

THE COURT: Have I adequately explained Rule 32 to this assembled group?

MR. COHEN: You have, Judge.

THE COURT: Very well. Is there anything further than ordering the imposition of the sentence as stated?

MR. BELL: No, Your Honor.

THE COURT: All right. Madam Clerk, the sentence is ordered imposed as stated.

MR. COHEN: Thank you, Judge.

THE COURT: Thank you, Mr. Cohen. It's been a pleasure to have you in our court.

MR. COHEN: Thank you for your courtesy, Your Honor.

(Hearing concluded at 11:11 a.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF REPORTER

I, JOY KELLY, RPR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

JOY KELLY, RPR Date
U.S. Official Court Reporter

Federal Rules of Criminal Procedure 32

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United

States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30 (a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an

action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the

disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

8 U.S.C. § 1325

§ 1325. Improper entry by alien

(a) Improper time or place; avoidance of examinationor inspection; misrepresentation and concealment of facts. Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

(b) Civil penalty. Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of--

(1) at least $ 50 and not more than $ 250 for each such entry (or attempted entry); or

(2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.

(c) Marriage fraud. Any individual who knowingly enters into a marriage for the purpose of evading any provision of

the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $ 250,000, or both.

(d) Immigration-related entrepreneurship fraud. Any individual who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, fined in accordance with title 18, United States Code, or both.

18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1546

§ 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United

States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act [8 USCS § 1324a(b)], shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1956

§ 1956. Laundering of monetary instruments

(a)

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place

outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.

(1) In general. Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $ 10,000.

(2) Jurisdiction over foreign persons. For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the

foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets. A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.

(A) In general. A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority. A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with

respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title ~~thereto~~ passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31 [31 USCS §§ 5311 et seq.];

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978 [12 USCS § 3101(7)])[];

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844 (f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate

communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled

Substances Act [21 USCS § 863] (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act [22 USCS § 2778(c)], section 11 (relating to violations) of the Export Administration Act of 1979 [50 USCS Appx. § 2410], section 206 (relating to penalties) of the International Emergency Economic Powers Act [50 USCS § 1705], section 16 (relating to offenses and punishment) of the Trading with the Enemy Act [50 USCS Appx § 16], any felony violation of section 15 of the Food Stamp Act of 1977 [7 USCS § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $ 5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 USCS § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938 [22 USCS §§ 611 et seq.], or any felony violation of the Foreign Corrupt Practices Act;

(E) Environmental Crimes. a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $ 10,000.

(g) Notice of conviction of financial institutions. If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.

(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

18 U.S.C. § 2332b

§ 2332b. Acts of terrorism transcending national boundaries

(a) Prohibited acts.

(1) Offenses. Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)--

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

(2) Treatment of threats, attempts and conspiracies. Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

(b) Jurisdictional bases.

(1) Circumstances. The circumstances referred to in subsection (a) are--

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;

(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

(2) Co-conspirators and accessories after the fact. Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

(c) Penalties.

(1) Penalties. Whoever violates this section shall be punished--

(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;

(B) for kidnapping, by imprisonment for any term of years or for life;

(C) for maiming, by imprisonment for not more than 35 years;

(D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

(2) Consecutive sentence. Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment.

(d) Proof requirements. The following shall apply to prosecutions under this section:

(1) Knowledge. The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

(2) State law. In a prosecution under this section that is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted.

(e) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction--

(1) over any offense under subsection (a), including any threat, attempt, or conspiracy to commit such offense; and

(2) over conduct which, under section 3, renders any person an accessory after the fact to an offense under subsection (a).

(f) Investigative authority. In addition to any other investigative authority with respect to violations of this title, the Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism, and any violation of section 351(e), 844(e), 844(f)(1), 956(b), 1361, 1366(b), 1366(c), 1751(e), 2152, or 2156 of this title, and the Secretary of the Treasury shall assist the Attorney General at the request of the Attorney General. Nothing in this section shall be construed to interfere with the authority of the United States Secret Service under section 3056.

(g) Definitions. As used in this section--

(1) the term "conduct transcending national boundaries" means conduct occurring outside of the United States in addition to the conduct occurring in the United States;

(2) the term "facility of interstate or foreign commerce" has the meaning given that term in section 1958(b)(2);

(3) the term "serious bodily injury" has the meaning given that term in section 1365(g)(3);

(4) the term "territorial sea of the United States" means all waters extending seaward to 12 nautical miles from the baselines of the United States, determined in accordance with international law; and

(5) the term "Federal crime of terrorism" means an offense that--

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of--

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1362 (relating to destruction of communication lines, stations, or systems),

1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism, or 2340A (relating to torture) of this title;

(ii) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 *(42 U.S.C. 2284)*; or

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.

18 U.S.C. § 2339B

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.

(1) Unlawful conduct. Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

(2) Financial institutions. Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall--

(A) retain possession of, or maintain control over, such funds; and

(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) Civil penalty. Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of--

(A) $ 50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

(c) Injunction. Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(d) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Investigations.

(1) In general. The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

(2) Coordination with the department of the treasury. The Attorney General shall work in coordination with the Secretary in investigations relating to--

(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

(B) civil penalty proceedings authorized under subsection (b).

(3) Referral. Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

(f) Classified information in civil proceedings brought by the United States.

(1) Discovery of classified information by defendants.

(A) Request by United States. In any civil proceeding under this section, upon request made ex parte and in writing by the United States, a court, upon a sufficient showing, may authorize the United States to–

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Order granting request. If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(C) Denial of request. If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

(2) Introduction of classified information; precautions by court.

(A) Exhibits. To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

(B) Determination by court. The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

(3) Taking of trial testimony.

(A) Objection. During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) Action by court. In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including--

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

(C) Obligation of defendant. In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

(4) Appeal. If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

(5) Interlocutory appeal.

(A) Subject of appeal. An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court--

(i) authorizing the disclosure of classified information;

(ii) imposing sanctions for nondisclosure of classified information; or

(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.

(B) Expedited consideration.

(i) In general. An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

(ii) Appeals prior to trial. If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

(iii) Appeals during trial. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--

(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial;

(II) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(III) shall render its decision not later than 4 days after argument on appeal; and

(IV) may dispense with the issuance of a written opinion in rendering its decision.

(C) Effect of ruling. An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

(6) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

(g) Definitions. As used in this section--

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning as in section 2339A;

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act [*8 USCS § 1189*].

18 U.S.C. § 2342

§ 2342. Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter [18 USCS §§ 2341 et seq.] to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction.

18 U.S.C. § 3552

§ 3552. Presentence reports

(a) Presentence investigation and report by probation officer. A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of *Rule 32(c) of the Federal Rules of Criminal Procedure*, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) Presentence study and report by Bureau of Prisons. If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period by not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the

defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to *28 U.S.C. 994*(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter [*18 USCS § § 3551* et seq.].

(c) Presentence examination and report by psychiatric or Psychological examiners. If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, the court may order the same psychiatric or psychological examination and report thereon as may be ordered under section 4244(b) of this title.

(d) Disclosure of presentence reports. The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed.

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.

(1) In general. Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 [*18 USCS § § 1460* et seq., 2241 et seq., 2251 et seq., or 2421 et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose

an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with *Federal Rule of Criminal Procedure* 32. In the event that the court relies upon statements received in camera in accordance with *Federal Rule of Criminal Procedure* 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and

commitment, to the Probation System and to the Sentencing Commission,[,] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the

Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act *(21 U.S.C. 841,* 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act *(21 U.S.C. 960,* 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [*21 USCS § 848];* and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of

conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [*21 USCS § 849*, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18,

United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [*21 USCS § 849*, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this

subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [*21 USCS § 812* note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the

sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18,

United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $

200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [*21 USCS § 844*] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $ 500,000 if the defendant is an individual; or

(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [*21*

USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined.

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [*21 USCS § 830]*) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [*21 USCS § 830]* have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2101

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

U.S.S.G. § 2E4.1

§ 2E4.1. Unlawful Conduct Relating to Contraband Cigarettes

(a) Base Offense Level (Apply the greater):

(1) 9; or

(2) the offense level from the table in § 2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

Statutory Provision: *18 U.S.C. § § 2342*(a), 2344(a).

Application Note:

1. "Tax evaded" refers to state excise tax.

Background: The conduct covered by this section generally involves evasion of state excise taxes. At least 60,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in § 2T4.1.

U.S.S.G. § 2S1.1

§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by 6 levels.

(2) (Apply the Greatest):

(A) If the defendant was convicted under *18 U.S.C. § 1957*, increase by 1 level.

(B) If the defendant was convicted under *18 U.S.C. § 1956*, increase by 2 levels.

(C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by 4 levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by 2 levels.

Commentary

Statutory Provisions: *18 U.S.C. § § 1956*, 1957, 1960 (but only with respect to unlicensed money transmitting businesses as defined in *18 U.S.C. § 1960*(b)(1)(C)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions. For purposes of this guideline:

"Crime of violence" has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Criminally derived funds" means any funds derived, or represented by a law enforcement officer, or by another person at the direction or approval of an authorized Federal official, to be derived from conduct constituting a criminal offense.

"Laundered funds" means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of *18 U.S.C. § 1956* or § 1957.

"Laundering funds" means making a transaction, financial transaction, monetary transaction, or transmission, or transporting or transferring property, funds, or a monetary instrument in violation of *18 U.S.C. § 1956* or § 1957.

"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. "Minor" means an individual under the age of 18 years.

2. Application of Subsection (a)(1).

(A) Multiple Underlying Offenses. In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) Defendants Accountable for Underlying Offense. In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under § 1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Application of Chapter Three Adjustments. Notwithstanding § 1B1.5(c), in cases in which subsection

(a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived.

3. Application of Subsection (a)(2).

(A) In General. Subsection (a)(2) applies to any case in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under § 1B1.3(a)(1)(A)), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) Commingled Funds. In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

(C) Non-Applicability of Enhancement. Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under *18 U.S.C. § 1956*(h) and the sole object of that conspiracy was to commit an offense set forth in *18 U.S.C. § 1957*.

4. Enhancement for Business of Laundering Funds.

(A) In General. The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(C).

(B) Factors to Consider. The following is a non-exhaustive list of factors that may indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C):

(i) The defendant regularly engaged in laundering funds.

(ii) The defendant engaged in laundering funds during an extended period of time.

(iii) The defendant engaged in laundering funds from multiple sources.

(iv) The defendant generated a substantial amount of revenue in return for laundering funds.

(v) At the time the defendant committed the instant offense, the defendant had one or more prior convictions for an offense under *18 U.S.C. § 1956* or § 1957, or under *31 U.S.C. § 5313*, § 5314, § 5316, § 5324 or § 5326, or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. A conviction taken into account under subsection (b)(2)(C) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

(vi) During the course of an undercover government investigation, the defendant made statements that the

defendant engaged in any of the conduct described in subdivisions (i) through (iv).

5. (A) Sophisticated Laundering under Subsection (b)(3). For purposes of subsection (b)(3), "sophisticated laundering" means complex or intricate offense conduct pertaining to the execution or concealment of the *18 U.S.C. § 1956* offense.

Sophisticated laundering typically involves the use of--

(i) fictitious entities;

(ii) shell corporations;

(iii) two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or

(iv) offshore financial accounts.

(B) Non-Applicability of Enhancement. If subsection (b)(3) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of subsection (b)(3) of this guideline, do not apply subsection (b)(3) of this guideline.

6. Grouping of Multiple Counts. In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §. 3D1.2 (Groups of Closely-Related Counts).

U.S.S.G. § 2T4.1

§ 2T4.1. Tax Table

Offense Level
Tax Loss (Apply the Greatest):
(A) $ 2,000 or less 6
(B) More than $ 2,000 8
(C) More than $ 5,000 10
(D) More than $ 12,500 12
(E) More than $ 30,000 14
(F) More than $ 80,000 16
(G) More than $ 200,000 18
(H) More than $ 400,000 20
(I) More than $ 1,000,000 22
(J) More than $ 2,500,000 24
(K) More than $ 7,000,000 26
(L) More than $ 20,000,000 28
(M) More than $ 50,000,000 30
(N) More than $ 100,000,000 32
(O) More than $ 200,000,000 34
(P) More than $ 400,000,000 ..... 36.

U.S.S.G. § 3A1.4

§ 3A1.4. Terrorism

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes

1. "Federal Crime of Terrorism" Defined. For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in *18 U.S.C. § 2332b*(g)(5).

2. Harboring, Concealing, and Obstruction Offenses. For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under *18 U.S.C. §* 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.

3. Computation of Criminal History Category. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

4. Upward Departure Provision. By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in *18 U.S.C.* § *2332b*(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in *18 U.S.C.* § *2332b*(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.

U.S.S.G § 3B1.1

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised

management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. . There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

U.S.S.G. § 3C1.1

§ 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

2. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled

substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., *18 U.S.C. § § 1510,* 1511);

(j) failing to comply with a restraining order or injunction issued pursuant to *21 U.S.C. § 853*(e) or with an order to repatriate property issued pursuant to *21 U.S.C. § 853*(p).

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater

sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;

(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(d) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight));

(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).

6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or

information that, if believed, would tend to influence or affect the issue under determination.

7. If the defendant is convicted of an offense covered by § 2J1.1 (Contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

8. If the defendant is convicted both of an obstruction offense (e.g., *18 U.S.C. § 3146* (Penalty for failure to appear); *18 U.S.C. § 1621* (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

9. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.